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IN THE

# Supreme Court of the United States

October Term, 2001

REPUBLICAN PARTY OF MINNESOTA, ET AL.,

*Petitioners,*

v.

KELLY, ET AL.,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION SUPPORTING PETITIONERS

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## INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles embodied in the Bill of Rights. The Minnesota Civil Liberties Union is one of its statewide affiliates. Since its founding in 1920, the ACLU has been deeply involved in securing the free speech rights embodied in the First Amendment. In support of that central organizational goal, the ACLU has appeared before this Court in numerous free speech cases both as direct counsel and as *amicus curiae*.

The ACLU takes no position on the propriety of an elected as opposed to an appointed judiciary. However, it strongly believes that if a state does provide for popular election of judges, campaign speech by candidates for judicial office, like campaign speech by candidates for other offices, is entitled to the highest degree of First Amendment protection.

## SUMMARY OF ARGUMENT

Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct specifies, in the provision under review, that a candidate for judicial office shall not "announce his or her views on disputed legal or political issues."[2] Construing this

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[1] Petitioners have informed counsel for *amici* that the parties have filed blanket letters of consent with the Clerk pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Canon 5(A)(3)(d)(i) reads in full:

> A candidate for judicial office, including an incumbent judge shall not: (i) make pledges or promises of conduct in office

"announce" clause to prohibit candidates only "from publicly making known how they would decide issues likely to come before them as judges" (P. App. 53a), the Eighth Circuit upheld the prohibition against First Amendment challenge as serving Minnesota's interests in guaranteeing the "independence" of its judiciary and preserving public confidence in the judiciary. (P. App. 26a, 44a, 52a). The "announce" clause, as written and as construed by the Eighth Circuit, cannot survive the strict scrutiny required by the First Amendment.

The "announce" clause, as written, plainly violates the First Amendment. As the Eighth Circuit recognized, the government may not prohibit candidates for elective judicial office from generally expressing views on "disputed legal or political issues." Such speech is core political speech, commanding the highest degree of First Amendment protection. A judicial candidate's expression of views on such issues does not inherently threaten "judicial independence" or any other interest that the government may validly seek to protect. The only conceivable rationale for prohibiting such speech is that voters should not be encouraged to select judges on the basis of their legal or political views. The First Amendment, however, does not permit the government to dictate what voters may consider in

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other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent.

52 Minn. Stat., Code of Jud. Conduct, Canon 5(A)(3)(d)(i). Violations of this Canon are subject to disciplinary action by the Minnesota Office of Lawyers Professional Responsibility ("OLPR") under the direction of the Minnesota Lawyers Professional Responsibility Board ("LPRB"). (P. App. 10a).



electing candidates for public office. Moreover, in states where judges are elected, such a general prohibition would undermine the democratic function by disabling the electorate from influencing the direction of the courts, by preventing candidates from responding to attacks, and by shielding incumbents from criticism by challengers.

Neither is the prohibition saved by construing it, as the court below did, to prohibit judicial candidates only from "making known how they would decide issues likely to come before them as judges." Such a construction does not cure the overbreadth of the general prohibition because, as Judge Posner has observed, there is almost no legal or political "issue" that is *unlikely* to come before a judge of a court of general jurisdiction in this country. Moreover, a prohibition against a candidate "making known" how he or she would decide such an issue is unconstitutionally vague, inviting the application of subjective judgment by those charged with enforcement in deciding whether the candidate has indeed expressed a view. The First Amendment requires that the boundary between permitted and prohibited speech be more clearly marked.

Properly understood, the government interest at stake in this case is the compelling interest in avoiding compromise of the judicial function of deciding each case on the basis of a fair and impartial hearing, after giving due consideration to the arguments and evidence presented by the parties. *Amici* agree that this function is central to the rule of law. Candidates for judicial office, once elected, cannot perform that function if they have already committed themselves, in advance, to reach a particular result in a particular case likely to come before them as judges. Thus, the First Amendment permits the government to protect the judicial function by regulating speech by judicial candidates that makes such advance commitments—as long as the regulation sweeps no further and delineates with sufficient clarity what speech is prohibited. To avoid unconstitutional vagueness, any such

regulation must be limited to speech by judicial candidates that expressly commits them to a particular result in a particular case likely to come before them.

## ARGUMENT

### I. THE "ANNOUNCE" CLAUSE VIOLATES THE FIRST AMENDMENT.

#### A. The Government May Not Prohibit Candidates for Elective Judicial Office from Generally Expressing their Views on "Disputed Legal and Political Issues."

Political expression "occupies the core of the protection afforded by the First Amendment," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), and the First Amendment interest in protecting political speech is at its very peak during election campaigns. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971). Not only is "'debate on the qualifications of candidates integral to the operation of the system of government established by our Constitution,'" *Eu v. San Francisco Cty. Democratic Cen. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)); equally important, an election campaign is "'a means of disseminating ideas,'" *id.* (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979)), including views on "'structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.'" *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)).

The Court thus has held that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley*, 424 U.S. at 50; *see generally, e.g., Eu*, 489 U.S. at



214 (invalidating law barring political parties from making pre-primary endorsements); *Brown*, 456 U.S. at 45 (invalidating statute that authorized voiding an election if a candidate made a false campaign statement); *Buckley*, 424 U.S. at 13-16 (invalidating restrictions on the amount of money a candidate may spend campaigning for office); *Mills*, 384 U.S. at 214 (invalidating law banning election day endorsements of candidates by newspapers).

As the Court has recognized, the First Amendment protects the candidate as well as the voter. "The political candidate does not lose the protection of the First Amendment when he declares himself for public office." *Brown*, 456 U.S. at 53. To the contrary:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election. . . . Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country "public discussion is a political duty," *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office.

*Id.* at 52-53.

These principles apply no less to speech by and about candidates for elective judicial office than to speech by and about candidates for other elective office. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will

inevitably shape the course that we follow. . . ." *Buckley*, 424 U.S. at 14-15. The fact that candidates seek election as judges does not free the government to "hamstring[ ] voters seeking to inform themselves about the candidates and the campaign issues." *Eu*, 489 U.S. at 223. There is no "judicial candidate" exception to the First Amendment.

Even if it were possible to isolate from the universe of all "disputed legal or political issues" those "likely to come before the courts," speech on such issues by judicial candidates—as well as by their supporters and opponents—lies at the heart of the First Amendment. "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 839 (1978). In a state where judges are elected, a judicial election campaign is not only the most obvious occasion for public debate on such matters; it is also the *only* occasion on which such matters are susceptible to influence by the electorate. A candidate for governor of a state that provides for an appointed judiciary may place such matters in issue in an election campaign by praising or criticizing the state's courts for the direction of their decisions, and by pledging to appoint—or not to appoint—judges who, for example, would be "tough on crime," protect the civil rights of homosexuals, or preserve a woman's "right to choose." In a state where judges are elected, however, these are matters that can be presented to the electorate only in the context of a judicial election campaign. Thus, candidates seeking election or reelection to judicial office must be allowed to address such matters and the voters to consider them. *Cf. Craig v. Harney*, 331 U.S. 367, 377 (1947) ("Judges who stand for reelection run on their records. . . . Discussion of their conduct is appropriate, if not necessary."). Moreover, if a judicial candidate is *attacked* for supposedly holding a particular view on a controversial legal or political issue, the candidate must be free to respond. The speech restriction at issue in this case



would not permit the candidate to do so. Incumbents, in turn, are insulated from attack by challengers.[3]

Nothing in the nature of the judicial function licenses the government to limit what a judicial candidate may reveal about himself—and what the electorate may learn about him—to those matters that the government deems "relevant" or "important" to a candidate's selection as a judge. Under the First Amendment, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

> In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

*Buckley*, 424 U.S. at 57.

Accordingly, "[i]t is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign." *Brown*, 456 U.S. at 60 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). As the Court stated in *Brown*:

> [The First Amendment] embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between

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[3] Indeed, the Minnesota Code of Judicial Conduct specifies that a candidate's response to statements made during a campaign for judicial office must comply with the limitations of Canon 5(A)(3)(d). *See* 52 Minn. Stat., Code of Jud. Conduct, Canon 5(A)(3)(e).

> candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.

*Id.; see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986) ("'A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983); *Eu*, 489 U.S. at 223 ("A 'highly paternalistic approach' limiting what people may hear is generally suspect, but it is particularly egregious where the State censors . . . political speech. . . .") (citations omitted); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1977) (stating that First Amendment prohibits government from "limiting the stock of information from which members of the public may draw"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) (characterizing as "dubious" any justification for restricting speech that is "based on the benefits of public ignorance").[4]

The notion that the government may seek to prevent voters from selecting judges on the basis of their views on disputed legal or political issues, because the government believes that such factors should not be "relevant," closely resembles the notion—rejected by this Court—that speech may be restricted "in the name of preserving the dignity of the bench." *Landmark Communications*, 435 U.S. at 840.

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[4] That the "announce" clause is viewpoint-neutral is immaterial: "This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition on public discussion of an entire topic." *Burson v. Freeman*, 504 U.S. 191, 197 (1992).



The Court has recognized that "speech cannot be punished when the purpose is simply 'to protect the court as a mystical entity or judges as individuals or as anointed priests set apart from the community." *Id.* (quoting *Bridges v. California*, 314 U.S. 252, 291-92 (1941) (Frankfurter, J., dissenting)).

Even if the First Amendment permitted the government to decide that voters should not select judges on the basis of their views on public issues or other matters, the government could not prevent candidates from holding those views or from acting on them once elected. Thus, a rule preventing the candidate from disclosing those views would simply result in a "blind" choice by the voters, disabled from distinguishing among candidates on the basis of factors that may well affect the actions of the candidates once elected. The result would not be a judiciary composed of judges who bring to the bench no views on the issues that may come before them. *See generally Laird v. Tatum*, 409 U.S. 824, 831-36 (1972) (Rehnquist, J.) (on motion for recusal) (discussing pre-nomination expressions of views on issues likely to come before the Court by Justices Black, Frankfurter, Jackson, and Holmes, and by Chief Justices Vinson and Hughes). The result would be an electorate effectively disenfranchised by having to choose in the dark, disabled from "predicting the effect of their vote." *Brown*, 456 U.S. at 55-56.

### B. Limiting the Prohibition to Expression "Making Known" a Candidate's Views on "Issues Likely To Come before the Court" Does Not Save It.

"When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment . . . requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily

circumscribing protected expression." *Brown*, 456 U.S. at 53-54. The "announce" clause, even as construed by the Eighth Circuit to prohibit judicial candidates only from "making known how they would decide issues likely to come before them as judges" does not satisfy these requirements.[5]

**1. The government interest at issue here is the compelling interest in avoiding prejudgment of cases.**

A state has a compelling interest in fair and impartial decisionmaking by its judges—decisions based on the evidence and arguments adduced by the parties to the case and subjected to the rigors of the adversary process. It would subvert this judicial function for a judicial candidate to commit himself in advance to a particular result in a particular case, without benefit of such evidence or argument. Thus, a state plainly has a compelling interest in regulating candidate speech that expressly commits the candidate, in advance, to particular results in particular cases. A state may regulate such speech "without trenching on any right . . . protected by the First Amendment." *Brown*, 456 U.S. at 55.[6]

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[5] The current ABA Model Canon suffers from the same defects of vagueness and overbreadth as the "announce" clause as construed by the Eighth Circuit. The ABA Model Canon prohibits judicial candidates from making statements "that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Jud. Conduct, Canon 5(A)(3)(d)(ii).

[6] Although incompatible with the judicial function, precommitment is not incompatible with the legislative function. Under our system, candidates for legislative office are meant to be elected on the basis of what voters expect them to do once in office if elected. Our system presupposes that candidates for legislative office will be free to tell voters quite specifically how they would exercise public power, whether by "a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes. . . ."



**2. Construing the "announce" clause to apply only to "issues likely to come before the court" is not a meaningful limitation.**

It is elementary that, to survive First Amendment scrutiny, a restriction on political speech must be drafted so that only speech that threatens the cognizable government interest is prohibited. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Brown*, 456 U.S. at 54 (restriction must operate without "unnecessarily circumscribing protected expression"). The "announce" clause as written and as construed is fatally overbroad, banning speech by judicial candidates that threatens no legitimate government interest, much less a compelling one. The rule, as Judge Beam observed, "effectively bans campaigning itself." (P. App. 76a) (dissenting opinion).

Judge Posner accurately described the effect of the "announce clause" as written:

> The "announce" clause is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. The rule certainly deals effectively with the abuse that the draftsmen were concerned with; but in so doing it gags the judicial candidate. He can say nothing in public about his judicial philosophy; he cannot, for example,

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*Brown*, 456 U.S. at 58. The judiciary, by contrast, "has a different job to do." (P. App. 18a). Thus, a rule regulating express precommitment, while constitutionally permissible as applied to judicial candidates, is not—as the Court held in *Brown*—constitutionally permissible as applied to candidates for legislative office.

> pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. He cannot criticize *Roe v. Wade*. He cannot express his views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of prisons, or products liability—or for that matter about laissez faire economics, race relations, the civil war in Yugoslavia, or the proper direction of heath-care reform.

*Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) (Posner, J.). The rule on its face thus bars far more speech than could reasonably be construed as committing a candidate to a result that would compromise his impartiality as a judge.[7]

The narrowing construction adopted by the Eighth Circuit does not solve this problem. As Judge Posner noted:

> There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction. The civil war in Yugoslavia? But we have cases in which Yugoslavs resist deportation to that nation on the ground that they face persecution from one side or another in that nation's multisided civil war; and some years ago the Illinois courts were embroiled in a custody fight involving a child

[7] The "pledges or promises" clause of Canon 5(A)(3)(d)(i), *see* note 2, *supra*, although it comes closer to focusing on the problem that could legitimately be regulated in judicial elections, suffers from the same vagueness and overbreadth problems inherent in the "announce" clause. For example, the clause could be read to prohibit a candidate from "pledging" or "promising" to be "tough on criminals" or observant of "victims' rights." *See Illinois Judicial Review Bd.*, 997 F.2d at 228-29 (Posner, J.).



> who didn't want to return to the then Soviet Union with his Soviet parents.

*See id.* at 229. Even as construed by the Eighth Circuit, the "announce" clause could be deemed to limit discussion of a candidate's philosophy of judicial interpretation—a perennially disputed "legal" issue. A candidate could not safely pledge himself to "textualism" or to the "rule of lenity," even though these pledges would not undermine his ability to render impartial decisions by committing himself in advance to specific outcomes in particular cases. A candidate similarly could not safely make his views known on such issues as abortion or assisted suicide, or almost any other controversial issue that might be identified, since all might come before the court in one way or another. *See* PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86-87 (1990) (compiling list of various ethics advisory bodies that have suggested that abortion, gun control, the equal rights amendment, drug laws, gambling laws, liquor licensing, pre-trial release, capital punishment, and labor law may not be discussed). In short, limiting the "announce" clause to speech regarding issues "likely to come before the court" offers only an illusion of narrowing and does not avoid vagueness and overbreadth. It is no limitation at all.[8]

[8] The Eighth Circuit predicted that the Minnesota Supreme Court would conclude, if faced with the question, that "general" discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause. (P. App. 54a). The Eighth Circuit also pointed out that the OLPR has issued advisory opinions stating that Canon 5 does not prohibit candidates from discussing appellate court decisions, judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's view on a judge's role generally in the judicial system. (P. App. 54a) (citing Minn. Bd. on Jud. Standards, Informal Op. 10/10/1990). Because of these

### 3. Prohibiting judicial candidates from "making known" their views is unconstitutionally vague.

Vague laws are unconstitutional because they may not only "trap the innocent by not providing fair warning," and foster "arbitrary and discriminatory enforcement," but also because they inhibit protected speech by causing" citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (quotations omitted); *see Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Kolender v. Lawson*, 461 U.S. 352 (1983); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

A candidate plainly "makes known" his or her position on an issue by means of an explicit statement regarding the issue, such as "I oppose abortion." However, it is certainly also possible to treat as an expression of a candidate's views more subtle or indirect communications. For example, a candidate's resume may contain many clues about his or her views on disputed political or legal issues of the day, as might circulation by the candidate of articles by others characterizing the candidate's views. If a candidate reported, for example, that he or she is a "devout member of the Catholic Church," it is possible that the reporting of that fact would be deemed an expression of the candidate's stance on abortion, contraception, assisted suicide, stem cell research, homosexuality, or the appropriateness of the death penalty. *See* McFADDEN, *supra*, at 81-82. Similarly, stating affiliations with the NAACP, the Federalist Society, NOW, or the NRA may similarly be construed to express a view on the issues associated with those groups. Indeed, members of the OLPR who disapprove of particular affiliations might for that very reason construe disclosure of those affiliations as a forbidden expression of views. *Cf. Gentile*, 501 U.S. at 1051 ("[H]istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.").

As a result of the vagueness inherent in the challenged rule even as construed, candidates are left to "guess at its

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glosses, the Eighth Circuit concluded that candidates in Minnesota are left to discuss much more than mere "name, rank, and serial number." (P. App. 56a) (quoting *Illinois Judicial Inquiry Bd.*, 997 F.2d at 227). These predictions, however, are not only suppositional but reflect the ad hoc judgments that the rule entails and extent to which the decision below rests on subjective future judgments by speech regulators. A judicial candidate simply cannot predict what will be considered a "disputed legal or political" issue. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991) (finding vagueness because terms had no "settled usage or tradition of interpretation").

The varied interpretations and limits given to similar clauses by several lower courts demonstrate its lack of precision. *Compare, e.g., Stretton v. Disciplinary Bd. of Supreme Ct. of Pa.*, 944 F.2d 137 (3d Cir. 1991) (limiting clause to views on disputed legal or political issues likely to come before court), *and Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), *aff'd mem.*, 861 F.2d 719 (6th Cir. 1998) (holding that views regarding domestic relations reforms and to take an active role in court administration were "related to the faithful performance of the duties of judicial office"), *and Ackerson v. Kentucky Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991) (holding Canon overbroad to extent it prohibited campaign commitments regarding administrative matters, but upholding prohibition regarding issues likely to come before court), *with Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993) (finding Illinois' version of rule unconstitutionally vague and overbroad), *and Beshear v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991) (same), *rev'd on other grounds*, 966 F.2d 1458 (8th Cir. 1992), *and ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990) (same).

contours," *id.* at 1048, and each potential "statement" must necessarily be considered a risk. The rule as construed "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim" and "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins,* 323 U.S. 516, 535 (1945). Judicial candidates are thereby put to the choice of risking punishment by speaking or avoiding such risk by keeping silent or submitting their campaign material and proposed statements to state authorities for preapproval. Those are the very choices to which this Court has held the government may not put would-be speakers. *See, e.g., Buckley*, 424 U.S. at 41 n.47 (powers delegated to advisory board do not assure that "vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future election years").

### C. The Government May Serve Its Compelling Interest in Avoiding Prejudgment by Regulating Speech by Judicial Candidates that Expressly Commits Them in Advance to a Particular Result in a Particular Case Likely To Come before the Court.

The First Amendment permits a state to protect the judiciary by regulation speech by judicial candidates that expressly commit them in advance to a particular result in a particular case likely to come before the court. Such a rule would avoid the problems of overbreadth and vagueness that render the "announce" clause invalid. Any such limitation, however, must apply only to speech that expressly commits a candidate to a specific result; barring speech that could be construed by some listener or disciplinary board as an "implied" commitment, or that would "appear" to commit a candidate, would result in the same flaws that taint the "announce clause," leaving the speaker unable to distinguish



"permitted" speech from "prohibited" speech and inviting arbitrary application of the restriction, ultimately chilling core political speech.

This Court has previously recognized the problems with this approach. In *Buckley v. Valeo*, this Court upheld against a vagueness challenge a provision of the Federal Election Campaign Act of 1971 that banned certain expenditures "relative to" a clearly identified candidate by construing the provision to bar only communications that "in express terms advocate the election or defeat of a clearly identified candidate." *Buckley,* 424 U.S. at 45. It was not enough, the Court reasoned, to limit the provision to statements "advocating" the election or defeat of a candidate, because the line between "advocacy" and other categories of expression is too indefinite and "'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* at 43 (quoting *Thomas,* 323 U.S. at 535). Instead, the Court held, the provision must be limited to "communications that include explicit words of advocacy of election or defeat," *id.*—words such as "'vote for,' 'elect,' 'support,' 'defeat,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'," *id.* at 44 n.52. By so construing the provision, the Court ensured that it would regulate with the "'narrow specificity'" required by the First Amendment. *Id.* at 41 n.48 (quoting *Button,* 371 U.S. at 433).

Consistent with *Buckley*, a state may regulate the speech of a judicial candidate that promises, in express terms, to invalidate or uphold a particular state statute, affirm or reverse a particular ruling, impose a particular sentence on a particular defendant, or find particular facts. But a state may not prohibit the candidate from stating, for example, that a particular state law, common law doctrine, or judicial ruling

presents troublesome issues, that courts should not "coddle criminals," countenance "police misconduct," "invent new rights," or "disregard the will of the people." A rule limited to such explicit promises not only avoids vagueness problems but is narrowly drawn to provide maximum scope for protected core political expression. Such a narrowly drawn rule, limited to statements expressly prejudging the result in particular cases likely to come before the candidate as a judge, would allow the government to serve its compelling interest in protecting the judicial function, while still affording maximum protection for the "'unfettered interchange of ideas for the bringing about of political and social change desired by the people.'" *Buckley,* 424 U.S. at 14 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)).

Moreover, preserving the First Amendment rights of candidates and voters in judicial elections in this fashion would not deprive a state of other less restrictive means of protecting the integrity of the judicial function. Notably, once elected, a judge may be required to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. *See, e.g.,* 52 Minn. Stat., Code of Jud. Conduct, Canon 3(D)(1) (stating such a requirement). Such rules of conduct for sitting judges offer another layer of protection for the state's compelling interest in an impartial judiciary, without trenching on First Amendment rights.



## CONCLUSION

The judgment of the court of appeals should be reversed.

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